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COLLECTIVE BARGAINING AND THE ANTITRUST LAWS

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A central aim of the antitrust laws is the promotion of competition. A central aim of collective bargaining is the elimination of competition—according to classical trade union theory, the elimination of wage competition among all employees doing the same job in the same industry.¹ Given these disparate aims, the antitrust laws and collective bargaining will almost inevitably tend to clash. To harmonize them, the type of competition which the law is intended to foster must be carefully distinguished from the type of competition which union-employer bargaining can properly displace. The Supreme Court's last major effort to draw the demarcation line produced the *Pennington*² and *Jewel Tea*³ decisions of 1965.

Even more than other leading Supreme Court decisions, I find that *Pennington* and *Jewel Tea* provide a sort of Rorschach test for their commentators. The observer looks into the Justices' opinions and sees reflected those elements of the labor-antitrust problem which have always fascinated him. Since I participated as union counsel in these cases, I suspect I am peculiarly disposed to this reaction. Nonetheless, I believe some of the most novel and potentially most significant thinking of the Court can best be understood in light of the union arguments in the 1965 cases. So I will risk the charge of egocentricity, and begin there.

EARLY LIMITATIONS ON ANTITRUST LIABILITY

Prior to *Pennington* and *Jewel Tea*, two quite different legal theories were thought available to shield labor activities from anti-trust attack. First, and best known, was the so-called "union exemption" established in the *Hutcheson*⁴ case. Activity immunized against injunctions by the Clayton and Norris-LaGuardia Acts, read to-

¹ See, e.g., Sidney and Beatrice Webb, *Industrial Democracy* (London: Longmans, Green, 1902), pp. 173-177.

² *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

³ *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965).

⁴ *United States v. Hutcheson*, 312 U.S. 219 (1941).

gether, was not to be deemed an offense under the Sherman Act. The effect was to exempt from antitrust regulation peaceful, nonfraudulent union conduct in the course of a labor dispute, as long as a union acts in its own interest and does not combine with nonlabor groups. The corollary to this, however, as *Allen Bradley*⁵ made clear, was that labor organizations lose their immunity when they “aid nonlabor groups to create business monopolies and to control the marketing of goods and services.” Only when “acting alone” are unions exempt from Sherman Act coverage.

When do unions “act alone”? Presumably when they strike, picket, or boycott. When a union is engaged in organizational battles, therefore, the *Hutcheson* doctrine serves it admirably. But when a union has finally won recognition from an employer or group of employers, and enters into a collective bargaining relationship, can it any longer be said to be “acting alone”? Or do its agreements now become subject to scrutiny under the antitrust laws?

This problem might be finessed if unions could resuscitate and amplify a second (and older) theory limiting antitrust liability. In the *Apex Hosiery*⁶ opinion Justice Stone had said that the Sherman Act was intended to outlaw only “restraints of trade” as understood at common law, that is, restraints on “commercial competition in the marketing of goods or services . . . so substantial as to affect market prices.” But “an elimination of price competition based on differences in labor standards” was not prohibited.

Now, *Apex* itself dealt with a sit-down strike, obviously involving a union “acting alone.” If Justice Stone’s words could be taken at face value, however, they totally removed from antitrust coverage restraints on competition “based on differences in labor standards.” This was not a matter of a statutory “union exemption”; the Sherman Act, as written, would simply not apply to a certain class of restraints. Employers, or employers in combination with unions, would be as free as unions “acting alone” to halt competition grounded in wage differentials.⁷ In short, the Sherman Act would be confined to restraints on the product market, and the labor market would be beyond its ken.

⁵ *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 808 (1945).

⁶ *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495, 500, 503 (1940).

⁷ On the immunity of agreements among employers dealing with labor standards, see *Kennedy v. Long Island Railroad Co.*, 319 F.2d 366 (2d Cir. 1963), cert. denied, 375 U.S. 830 (1963).

PENNINGTON

In *Pennington* it was alleged that the United Mine Workers and the major coal producers had conspired to drive smaller, less efficient operators out of business by establishing a uniform industry-wide wage rate higher than the small producers could afford. If true, the allegation would make it hard for the UMW to rely on the *Hutcheson* exemption for a union "acting along." Yet the competition which was to be eliminated was competition "based on differences in labor standards," and thus arguably the *Apex* doctrine came into play. Moreover, wages are at the core of those subjects about which unions and employers are required to bargain under the National Labor Relations Act. These so-called "mandatory bargaining subjects," the unions argued, should be equated with Justice Stone's "labor standards." Surely a matter on which the labor laws compelled bargaining could not be the basis of a prosecution under the antitrust laws!

Inherent in this argument, of course, was the notion that the "purpose" of any wage pact is irrelevant—even if the purpose is to liquidate competitors. This proved the fatal flaw. But the flaw is perhaps more apparent in the abstract than in the concrete; it is probably easier to say a union and employers may not have a "predatory purpose" in a wage agreement than to determine, in any given case, what *is* the purpose. And the history of judicial assessment of union "purpose" is hardly reassuring.

At any rate, Justice White in delivering the opinion of the Court in *Pennington* was plainly troubled by the union argument, but he didn't buy it. He conceded that the bounds of the duty to bargain under the National Labor Relations Act have "great relevance" in considering the scope of labor's antitrust immunity.⁸ He then proceeded, however, to turn the union argument into a boomerang as applied to *Pennington* by introducing the new concept that the statutory duty to bargain exists only on a unit-by-unit basis. Unions and employers must negotiate about the wages and employment standards of workers in a particular bargaining unit, but apparently not about the standards outside a given unit. Thus, a union "forfeits" its antitrust "exemption" when it is "clearly shown" that it has agreed with one group of employers "to impose a certain wage scale on other bargaining units."⁹ Moreover, a union is "liable" if it becomes a party

⁸ 381 U.S. at 665.

⁹ *Ibid.*

to an employer conspiracy to eliminate competitors, even though the union's role is limited to securing certain wages, hours, or working conditions from the other employers.

This approach immediately raises a fistful of new questions. To begin with, Justice White suggests a distinction between the union's loss of antitrust immunity and its commission of a substantive violation.¹⁰ Does this mean an agreement with extra-unit implications merely removes the exemption, without necessarily resulting in a *per se* violation? If so, what added elements must be shown to establish an offense? As you know, the Supreme Court long ago declared that only "unreasonable" restraints on trade run afoul of the Sherman Act.¹¹ It may well be that resort to the "rule of reason" will enable the courts to exercise considerable flexibility in dealing with "extra-unit" agreements. A substantive violation might require a "predatory intent," a definite "purpose" to impede or destroy business competitors. The trial court on the remand in *Pennington* in effect so held.¹² I would contend this result is supported by the practical demands of meaningful collective bargaining; as we shall discuss in a moment, there are times when it is simply unrealistic to insist that an employer has no valid interest in the wage scale a union gets from the employer's competitors.

Another inquiry is whether the Supreme Court was proposing a special evidentiary standard in declaring that the extra-unit agreement must be "clearly shown." The Court explicitly refrained from passing on the sufficiency of the evidence in *Pennington*. Before a union can be held liable for the acts of an agent, "clear proof" of the authorizing of the acts is required by the Norris-LaGuardia Act, one of the statutory bases of labor's antitrust exemption. I recognize the desirability of finding some way to insulate union-employer bargaining from ill-founded inferences of "conspiracy" by overly suspicious or credulous juries. But I confess I think it takes a bit of stretching to extend Norris-LaGuardia's agency provision far enough to cover the antitrust evidentiary question. Nonetheless, the district court which handled *Pennington* on remand expressly held that Norris-LaGuardia makes

¹⁰ See also *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965).

¹¹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). *Cf.* *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) (trading rules for commodity exchanges)

¹² *Lewis v. Pennington*, 59 LRRM 2423, 53 LC ¶ 11,371 (E.D. Tenn. 1966).

“clear proof” necessary to establish predatory intent.¹³ Perhaps it would be more straightforward to say that a proper reconciliation of antitrust and labor policies calls for the Sherman Act to be interpreted, without reference to Norris-LaGuardia, as requiring evidence of an explicit union-employer agreement to force competitors out of business before a case could go to a jury. Mere knowledge that some marginal operators could not pay the prescribed industry wage scale would not, in itself, be sufficient.¹⁴

The practical implications of *Pennington's* new unit-by-unit bargaining rule are illustrated by the so-called “most favored nation” clause. This is a fairly common provision in labor contracts, especially in the construction industry, requiring the union to give the signatory employer the benefit of the most favorable terms the union subsequently accords any other employer. In actual operation, naturally, the usual effect is to freeze labor standards at the level of the initial contract. In the language of *Pennington*, the union has agreed, at least impliedly, “to impose a certain wage scale on other bargaining units.” This undoubtedly is a form of restraint, but is it not just another way of advancing the accepted labor policy of taking wages out of competition? In any event, a union recently charged an employer with a refusal to bargain under the National Labor Relations Act for insisting on a “most favored nation” clause, and the General Counsel of the National Labor Relations Board issued a complaint “to place the issue before the Board.”¹⁵ The General Counsel acted quite correctly, considering Justice White’s dictum that mandatory bargaining is confined to working conditions in an individual unit. But the Board should not feel itself foreclosed by *Pennington's* sweeping talk about units (which may command the assent of only three Justices)¹⁶ from making an independent appraisal of the problem.

What, after all, is more natural than for an employer to want assurance that his competitors will have to match any concessions he gives the union? As long as we endorse the policy of eliminating competition based on wage cutting, I see no reason to boggle at a

¹³ *Ibid.* See also *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

¹⁴ Justices Douglas, Black, and Clark, concurring in *Pennington*, apparently would regard the wage agreement under such circumstances as “prima facie” evidence of a violation. 381 U.S. at 673.

¹⁵ 63 BNA, *Labor Relations Reporter* 199 (Nov. 7, 1966).

¹⁶ The three concurring Justices made no mention of unit-by-unit bargaining, and simply declared that a union-employer agreement to set a high wage scale for the purpose of forcing marginal producers out of business would be in violation of the antitrust laws.

means so well adapted to attaining that end. Indeed, I find it hard to imagine how collective bargaining could stay healthy if discussion were choked off on some of the most vital subjects—the competitive position of various firms in an industry, the demands the union will make in other negotiations, and so on. And I see no essential difference between permitting discussion and permitting agreement, so long as there is no specific purpose of killing off competition. I find unpersuasive Justice White's argument that a union cannot be allowed to "straitjacket" itself in subsequent bargaining by commitments to "favored" employers in earlier negotiations. Those commitments may be the price the union has to pay to get the concessions in the first place. The employees in the original unit will hardly complain. The employees in the other units are more likely to gain than to lose when a "floor" is placed under wages. In the long run, upholding "most favored nation" provisions would probably do no more than hasten what the labor economists in this group know better than I is the usual result of union organization anyway, namely, the gradual "leveling" of wage rates throughout an industry.

The plight of the employer charged with an unfair labor practice because of *Pennington* underscores another important aspect of this decision. Its impact falls not so much upon organized labor as upon the institution of collective bargaining. Indeed, Justice White stressed that a union acting unilaterally, in furtherance of its own policies, still has the right to seek uniform wages in an industry. It is only when this is done pursuant to a union-employer agreement that antitrust issues arise. But *Pennington* applied literally may seriously hamstring collective bargaining as an instrument for coping with today's critical problems in industrial relations. For example, management's need to introduce technological improvements to increase productivity and meet competition is countered by labor's anxiety over the possible loss of job security and craft skills. Reconciling these opposing interests through attritional reductions in force, retraining allowances, and so forth, may be severely hampered if employers cannot be reassured on what will be demanded of their competitors.

The "most favored nation" clause can stand as a symbol of a whole range of activities which may be broadly classified as "pattern bargaining"—efforts by either unions or employers to obtain uniform labor contracts governing separate bargaining units. Since I have no time to deal with the many questions presented, let me just mention

two typical issues: Is it an antitrust violation (or an unfair labor practice) for two or more unions to coordinate bargaining policy with respect to different units of the same business? Is it an antitrust violation (or an unfair labor practice) for employers, in the absence of a formal multi-employer unit, to adopt common bargaining strategy or tactics, for instance, to agree upon joint lockouts in case one employer is struck?

JEWEL TEA

In *Pennington* a key question was whether a labor agreement dealing with wages would violate the antitrust laws if its purpose was to put certain competitors out of business. The answer was "yes." In *Jewel Tea* the question was quite different. Was it a violation of the Sherman Act for a butchers' union to compel a grocery chain to agree to a limitation on the hours fresh meat could be sold, after the union had entered into a multi-employer contract containing such a restriction? In essence, as viewed by a majority of the Court, the problem was one of characterization: Did this clause involve wages, hours, or working conditions, legitimate subjects of collective bargaining, or did it constitute a forbidden restraint on the product market?

The Court split three ways, with three Justices in each group. Justice White, Chief Justice Warren, and Justice Brennan found that the marketing hours restriction, which in effect defined the butchers' working hours and their job content, was "intimately related" to labor conditions. Thus the union's effort to secure the provision through arm's-length bargaining in pursuit of its own labor policies, and not in furtherance of a union-employer conspiracy, was exempt under the Sherman Act. Justices Goldberg, Harlan, and Stewart concurred for the same reasons that led them to dissent in *Pennington*. They accepted the union argument that agreements dealing with mandatory subjects of bargaining are wholly outside the antitrust laws. Justices Douglas, Black, and Clark dissented in *Jewel Tea* on the ground the operating hours limitation was an obvious restraint on the product market, and was not needed to fix employees' working hours. The multi-employer collective agreement itself was considered sufficient to show an illegal union-employer conspiracy to impose the marketing hours restriction on the holdout chain.

No single opinion in *Jewel Tea* represents the views of a majority of the Court. Rather than focus on the decision itself, therefore,

I am going to examine two long-standing legal issues on which *Jewel Tea* has revived debate.

First, if a union is protected by *Hutcheson's* exemption for a union "acting alone" when it strikes an employer over a particular bargaining demand, does it follow that a collective agreement granting that demand, even an agreement signed by a *group* of employers, is likewise immune to antitrust scrutiny? It has been argued that it would be an intolerable paradox to sanction economic warfare while outlawing the peace treaty.¹⁷ The anomaly may not be decisive; the Supreme Court, for example, accepts the anomaly that state right-to-work laws may be invoked against union security agreements but not against strikes to obtain them.¹⁸ On the other hand, certain language in *Allen Bradley* could be read to mean that a union commits a violation only when it participates in a *preexisting* employer conspiracy.¹⁹ Although Justice White would not immunize the agreement in *Jewel Tea* merely because it was between a union and a *single* employer, he emphasized that the union was acting in pursuit of its own labor policies and not at the behest of any employers.²⁰ This adds some weight to the notion that the source of the impulse for a particular provision may be crucial. A clause which would be barred by the antitrust laws if sought by employers may remain within the "union exemption" if sought by a labor organization. My difficulty with this is that I am skeptical about maintaining a neat dichotomy between union- and employer-motivated contract provisions. One side raises a problem in negotiations; the other proposes a solution; the first party modifies the suggestion. To whom do we ascribe the final product? I doubt whether the "source" test can be conclusive, although evidence of a clause's source may occasionally aid in determining its relation to working conditions.

The second problem spotlighted by *Jewel Tea* is what standard should be used to distinguish between agreements properly concerned with wages, hours, and other components of the labor market, and

¹⁷ Cox, "Labor and the Antitrust Laws—A Preliminary Analysis," 104 Univ. Pa. L. Rev. 252, 271 (1955). See also *Republic Productions v. Musicians*, 245 F. Supp. 475 (S.D.N.Y. 1965). *But cf.* Report of the Attorney General's National Committee to Study the Antitrust Laws (Washington, 1955), pp. 297-299.

¹⁸ *Retail Clerks Local 1625 v. Schermerhorn*, 375 U.S. 96, 105 (1963).

¹⁹ *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 809 (1945).

²⁰ *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 688-690 (1965).

agreements improperly concerned with the product market. Unlike the wage contract in *Pennington*, which in and of itself involved only a restraint on the labor market, the contract in *Jewel Tea* involved both a restraint on the labor market (a defining of the butchers' working hours and their job content) and a restraint on the product market (a restriction on the hours for selling fresh meat). Justice White assumed that if the agreement had dealt directly only with the product market (a fixing of a price schedule for the meat, for example), with any benefit to the employees merely an indirect consequence, it would not have been immune to the antitrust laws. What saved the *Jewel Tea* provision in his eyes was that the marketing-hours restriction was "intimately related" to wages, hours, and working conditions. The trial court had found as a fact that self-service meat sales were unfeasible, and therefore a limitation on operating hours was necessary to preserve the butchers' jobs and working hours.

In sustaining the agreement's exemption from the antitrust laws in this situation, Justice White at one point seemed to be "weighing" the employees' interests in labor standards against the admittedly adverse effects on product competition.²¹ Apparently for Justice White, any showing of an "immediate and legitimate" employee concern would be enough to tip the scales to the side of the union. My reaction to this approach is rather mixed. First, any reintroduction of the pre-Norris-LaGuardia judicial technique of "balancing" the social plusses and minuses of union objectives must be viewed with some apprehension. But, second, if such balancing is to be indulged in, it should not be just an armchair exercise. A dozen years ago Archibald Cox observed that there was "no reliable information on the extent or economic importance of union efforts to shelter employers from competition in the product market."²² As well as I can tell, things stand today as they stood then. If *Pennington* and *Jewel Tea* are to presage a resurgence of labor antitrust litigation (so far there has been surprisingly little), it would indeed be unfortunate for the Court to have to resolve some of the legal issues posed without more enlightenment on the economic realities. This is especially true in view of the improved tools for empirical research that have been developed in the past decade. I should hope that some of the economists and lawyers in the present group would be ready to work together to provide the necessary enlightenment.

²¹ *Id.* at 691.

²² Cox, *op. cit.* *supra* note 17, p. 272.

CONCLUSION

Pennington establishes that unions and employers violate the anti-trust laws when they execute a labor contract whose purpose is to eliminate competitors, even if the agreement deals only with wages, hours, and working conditions. My feeling is that in the absence of such a predatory purpose there should be no substantive violation, regardless of whether antitrust "immunity" is lost because the contract covers labor standards outside a particular bargaining unit.

Jewel Tea indicates that even a direct restraint on the product market is exempt from the antitrust laws if the restraint is also "intimately related" to wages, hours, and other components of the labor market, at least where the union securing the agreement is acting on its own and not at the behest of employers. If the Court is hinting at a possible return to some effort to "weigh" the workers' stake in their job standards against the public's stake in a competitive economy, I suggest there is an urgent need for empirical data to enable the courts to strike a reasonably informed balance. Antitrust policy too readily tends to become a special branch of moral philosophy, and involvement with labor questions is likely to aggravate that tendency. "Weighing" interests here is risky business at best, but in any event the operation should be performed as far as possible with the humbler, and more appropriate, instruments of economic analysis.